

No. 15,973

In the

United States Court of Appeals

For the Ninth Circuit

MILDRED BECKER SCHULTZ,

Appellant,

vs.

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners d.b.a. TUNE TOWNE TUNES; CAPITAL RECORDS, INC.; CAPITAL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBA- LERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S, INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

Appellees.

Appellant's Reply Brief

CARL HOPPE

JAMES F. MITCHELL

2610 Russ Building
San Francisco 4, California

THOMAS P. MAHONEY

4055 Wilshire Boulevard
Los Angeles 5, California

Attorneys for Appellant

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Appellant's Reply Brief

Appellant files this reply in response (1) to Brief for Appellees Hill and Range Songs, Inc., et al. and (2) to Appellees' Brief for Carl Hoefle, et al. For purposes of convenience, references to the former brief will be (Hill Br., page . . .) and references to the latter brief will be (Hoefle Br., page . . .).

Appellant submits that the two appellees' briefs are not fully responsive to the issues presented in the Appellant's Opening Brief and that their brusque approach toward plaintiff's music, defendants' music, the prior art and the

law is wholly unwarranted by the record, particularly when it is considered in the light of legally established principles.

In this reply brief, we discuss the matters raised by defendants generally in the order set forth in their briefs with only such changes noted as seem appropriate to correlate substantially similar subject matter.

Defendants cite the prior music art appearing in the public domain as a source both for the Schultz figure and for the putative infringing publications. In their entire argument, they have not answered plaintiff's argument that the putative infringing bars and the Schultz figure have common peculiarities (Appellant's opening brief, pages 23-27) but they have endeavored to create the impression that these peculiarities are justified by the prior art. We therefore first turn to the prior art upon which the defendants have relied and show that it is no defense to the plaintiff's claim that defendants have copied her peculiar Schultz figure.

Defendants' reliance on Charlier is no defense to plaintiff's claim.

Defendants rely most heavily on Charlier's *De L' Articulation* (Ex. F. Exh. Book pp. 38-39) as a prior art source in the public domain justifying their publication of The Blacksmith Blues (Hill Brief, pp. 4, 12, 17-18). Charlier's music, speaking for itself, makes clear that it does not disclose the Schultz figure and that it is quite remote from defendants' version of that figure. For ease of comparison, the basic Schultz figure, The Blacksmith Blues version, and Charlier's figure are set forth in Plate I of an appendix to this brief, all being transposed to the same key for purposes of comparison.

Simple comparison discloses:

1. The Blacksmith Blues has the rhythm of the Schultz figure e.g. 3/16:1/16:3/16:1/16:1/8:1/4:1/8

and not the rhythm of Charlier, e.g. $1/8:1/8:1/8:-1/8:1/8:1/8$. This change of rhythm is not disclosed in the public domain for any do-mi-sol triad or for that matter for any other music;

2. The Blacksmith Blues and the Schultz figure both have a do-mi-sol triad with a passing note, the two differing only with respect to the exact tone quality of the passing note (fi vs. fa) and the exact value of the sol component, $1/4$ sol, $1/8$ sol vs. $1/4$ sol, $1/8$ rest) but being identical in all other respects. Charlier does not use such a figure, his figure being do-mi-do-fi-sol-mi. Therefore this phase of The Blacksmith Blues has seeming parentage in the Schultz figure and not in Charlier.
3. There is exact identity between 5 notes in The Blacksmith Blues and 5 notes in the Schultz figure in tone quality, time value and note placement in the bar (e.g. the $3/16$ do; the $1/16$ do; the $3/16$ mi; the $1/16$ mi; and the $1/4$ sol). There is an exact identity in the time value and note placement of the passing note (e.g. the $1/8$ fi and the $1/8$ fa). All that Charlier discloses is that the passing note may be a fi instead of a fa. This again indicates a more probable parentage of this figure in the Schultz figure than in Charlier.

In considering Charlier, defendants urge that the plaintiff and the experts noticed a great similarity between the first four bars of Charlier, when syncopated (presumably with the plaintiff's rhythm), and The Blacksmith Blues (Hill Brief, pp. 4, 12, 17-18). There is no mystery in this, nor does that fact impinge upon plaintiff's argument that defendants have used the Schultz figure as a basis for all of the statement portions of The Blacksmith Blues. All that

defendants have shown by their demonstration is that the little answers used in The Blacksmith Blues and that the modulations of The Blacksmith Blues were taken from Charlier. This is made abundantly clear from a comparison of the first answering bars of The Blacksmith Blues and Charlier, shown in the same key for purposes of comparison, in Plate II of the appendix to this brief.

We recognize a note quality sequence for 5 notes found in The Blacksmith Blues answer in exact note quality sequence for the first 5 notes found in Charlier, e.g., do, sol, mi, fi, sol, but with a syncopated rhythm following somewhat in the steps of the Schultz figure, e.g., $1/4:3/16:1/16:-1/8:3/4$. This little answer is not found in the Schultz music.

We further note that the first four bars of The Blacksmith Blues and Charlier are unmodulated, whereas the fifth through the eighth bars of The Blacksmith Blues and Charlier have both been modulated by descending the entire note formation three notes (compare Exh. Book p. 15, and Exh. Book p. 39).

Therefore, it is little wonder that there is a similarity between The Blacksmith Blues and Charlier on one hand as well as between The Blacksmith Blues and the Schultz figure on the other hand. This, by logical implication, proves merely that The Blacksmith Blues had two parents. But then plaintiff never did urge that she was any more than the parent of the Schultz figure and the syncopation in The Blacksmith Blues. Now defendants, in urging sole parentage in Charlier, actually prove:

1. That plaintiff supplied the Schultz figure used in each of the statements in The Blacksmith Blues, except for the exact note quality of the passing note. Such a peculiar statement is not found in Charlier and is not found in any of the prior art public domain material.

2. That Charlier furnished the form of answer and Schultz supplied the syncopation used in each of the answers to the statement. Such a form of answer, we admit, is not found in any of the Schultz music. And we do not charge that the answer portions of defendants' music infringes upon plaintiff's copyright, other than for the use of her syncopation.

3. That Charlier furnished the one bar statement, one bar response repetitive form of theme used in The Blacksmith Blues. This is not found in any of the Schultz music.

4. That Charlier furnished the 4 bar unmodulated formation followed by a 4 bar modulated formation of the original theme. This is not found in any of the Schultz music.

Defendants' argument thus establishes, not that plaintiff was not a source for The Blacksmith Blues, but that The Blacksmith Blues is a composite of the Schultz figure and Charlier. It also establishes that defendants are not above plagiarism because they virtually proclaim that Holmes is identical with Charlier which was copyrighted in 1926 and which did not enter the public domain until 1954, two years after defendants began to publish The Blacksmith Blues in 1952.

Plaintiff submits that this intermingling of her figure with the Charlier theme does not relieve the defendants of their legal obligations to account to her for their profits. The defense that an infringing publication is attributable to another source, where it is really a mixture, is a familiar one in copyright cases and it invariably fails.

Plaintiff's research discloses that this type of excuse was first raised in *Mawman v. Tegg* (1826), 2 Russ. 385, 38 Eng. Rep. 380. In that case Lord Eldon said, 2 Russ. 390, 38 Eng. Rep. 383:

“As to the hard consequences which would follow from granting an injunction, when a large proportion of the work is unquestionably original, I can only say, that if the parts, which have been copied, cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must [391] suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame.”

The view of Lord Eldon was incorporated into our copyright law in *Callaghan v. Myers* (1888), 128 U.S. 617. In *Callaghan*, the infringing work was a composite of work in the public domain (opinions of the Illinois Supreme Court) and copyrighted material of the court reporter (headnotes, statements of the case, and abstracts of arguments of counsel). Defendant argued that the reports were public property. Plaintiff argued that he was the owner of the headnotes, etc., and that the entire work was an infringement entitling him to the entire profits. The Supreme Court held, pp. 665-666:

“If the volume contains matter to which a copyright could not properly extend, incorporated with matter proper to be covered by a copyright, the two necessarily going together when the volume is sold, as a unit, and it being impossible to separate the profits on the one

from the profits on the other, and the lawful matter being useless without the unlawful, it is the defendants who are responsible for having blended the lawful with the unlawful, and they must abide the consequences, on the same principle that he who has wrongfully produced a confusion of goods must alone suffer."

The Court then quoted the comments of Lord Eldon and continued, p. 666:

"The present is one of those cases in which the value of the book depends on its completeness and integrity. It is sold as a book, not as the fragments of a book. In such a case, as the profits result from the sale of the book as a whole, the owner of the copyright will be entitled to recover the entire profits on the sale of the book, if he elects that remedy. *Elizabeth v. Pavement Co.*, 97 U.S. 126, 139."

The same rule was again applied in *Belford v. Scribner* (1892), 144 U.S. 488. The defendant, in preparing a cook book, intermixed portions of the plaintiff's cook book with other portions which were original. At page 508, the Court said:

"The rule is well settled, that, although the entire copyrighted work be not copied in an infringement, but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff. This was the rule laid down by this court in *Callaghan v. Myers*, 128 U.S. 617, 665, following *Mawman v. Tegg*, 2 Russell, 385, 391, and *Elizabeth v. Nicholson Pavement Co.*, 97 U.S. 126, 139."

Nor does the fact that defendants may also be liable to Charlier deprive plaintiff of her remedy. As said in an

analogous patent case of *Westinghouse Co. v. Wagner Mfg. Co.* (1912), 225 U.S. 604, 620:

“The fact that he may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability.”

And so in the case at bar plaintiff’s statutory claim to copyright protection is not to be “nullified” because defendants “had ingenuity enough to smother” her figure “with improvements belonging to themselves or to third persons” (Cf. *Westinghouse Co. v. Wagner Mfg. Co.* (1912), 225 U.S. 604, 615).

Defendants' reliance on the Saints is no defense to plaintiff's claim.

Defendants’ next specific reference is to “When the Saints Go Marching In” (Hill Br., p. 5). Defendants urge that this conforms notewise and “rhythmically as well” to plaintiff’s bar. The record belies this argument.

Howard Barlow, in his hearsay chart (R. 228, Exh. E, Exh. Bk. p. 34), discloses a modified version of this well-known spiritual (Bar. 8, Exh. E, Exh. Bk. p. 34). This is not a public domain version, but it is one which was used in “a picture made not long ago called ‘Ink Alley Blues’” (R. 229). This version, even if proved, is therefore not shown to be early enough to be prior art either as to plaintiff’s or as to defendants’ versions of the Schultz figure. Originally the song “was sung as rather a slow sort of a spiritual” (R. 229). Mr. Raksin demonstrated that when colored bands returned from funerals, they played it somewhat like “Waitin’ For My Baby” (R. 229). He also testi-

fied that he heard the song thus modified "in the days when I played in bands" (R. 229), but he did not testify when this was nor did he produce the orchestrations which were used by such bands. Although Mr. Raksin contended that his testimony "can be verified literally in the film and in the records" (R. 229), no such best evidence was introduced. Mr. Barlow's chart does not accord the same worth to the song since it admits that "The measures do not parallel each other" (Exh. Bk. p. 34).

The oral testimony as to the Saints cannot be given full credence because defendants did not produce the best evidence (R. 223). The rule is succinctly stated in *Interstate Circuit v. U.S.* (1939), 306 U.S. 208 at page 226:

"* * * The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. (Citation omitted.)"

The rule has particular force in copyright cases, where it is well settled that oral testimony is not acceptable to prove what is in the prior public domain. For example, in *Boucicault v. Fox* (S.D.N.Y. 1862), Fed. Cas. 1691, 3 F. Cas. 977, the defendant asked an expert to compare a copyrighted play with an alleged prior art novel which was not in evidence. The court held this to be improper, stating, page 979:

"* * * The book was in print, and could easily have been obtained. To undertake to prove a part of its contents, or to ask the witness whether such part was identical with, or resembled passages in, the play was wholly inadmissible, under any known rule of evidence. Whenever matter which is in print or in writing is presented to a court or a jury, for the purposes of construction, or to establish proof of identity, resemblance, or dissimilarity, the documents themselves must be presented for the inspection of the triers, or, on proper reason

for their non-production being shown, their contents must be shown. The rule is trite, familiar, and imperative."

And in *Encyclopaedia Britannica Co. v. American Newspaper Ass'n* (D.N.J. 1904), 130 Fed. 460, 461-462, the court said, page 462:

"* * * The opinions of experts, however competent they may be to discover plagiarisms and piracies, are secondary, and not primary, evidence."

Moreover, the best evidence in this record, which is still only hearsay (R. 228), discloses a lack of that unique commonness found in the songs at bar. Again, we revert to comparative bars; comprising in descending order in Plate III of the Appendix the Schultz figure, "The Blacksmith Blues," and the recently modified version of "When the Saints Come Marching In."

The differences are immediately apparent. In the Schultz figure and in "The Blacksmith Blues," the passing note has a value of $1/8$, in the Saints it has a value of $1/4$; in the Schultz figure and in "The Blacksmith Blues," the passing note occupies the first half of the third beat of the bar, in the Saints it occupies the entire last beat of the bar; in the Schultz figure and in "The Blacksmith Blues," the sol note includes a $1/4$ sol note in the last half of the third beat and in the first half of the fourth beat, in the Saints the sol component commences with a full note occupying the entire four beats of one entire bar.

The difference in rhythm is even more pronounced. The Schultz figure and "The Blacksmith Blues" use a rhythm of $3/16: 1/16: 3/16: 1/16: 1/8: 1/4: 1/8$. The Saints, as modified, uses an entirely different rhythm of $3/16: 1/16: 3/16: 1/16: 1/4: 1/1: 1/4$. The unique $1/8: 1/4: 1/8$ variation in

the last half of the bar is completely lacking in the Saints and in any other prior art.

Certainly the possible parentage between the modified Saints, even if the hearsay, secondary evidence be given complete credence, and "The Blacksmith Blues" is far more remote than the probable parentage between the Schultz figure and "The Blacksmith Blues."

Defendants' reliance on Mozart is no defense to plaintiff's claim.

The third specific prior art upon which defendant relies is a passage from a Mozart symphony (Hill Brief, pp. 5, 17). This passage, also, is from Mr. Barlow's hearsay chart (R. 230-231, Exh. Book p. 34).

For comparison, we chart the Schultz figure, The Blacksmith Blues figure and the Mozart figure in downwardly descending order in Plate IV of the Appendix to this Brief. It there appears that Mozart is even more remote from the Schultz figure than the art discussed above. Its rhythm is $1/8:3/32:1/32:1/8:3/32:1/32:1/8:3/32:1/32$ as compared to $3/16:1/16:3/16:1/16:1/8:1/4:1/8$ of Waitin' For My Baby and The Blacksmith Blues. It has no passing note component of any kind. It has the do, the mi, and the sol components each broken into two isolated components separated by a $3/32$ rest. The second half of the do and mi components are exactly $1/4$ of the first half of the do and mi components, whereas in the Schultz figure the second half is exactly $1/3$ of the value of the first half of the component.

As a matter of fact, this passage is identical with the passage from "La Czarina", which Mr. Schneider discussed on cross-examination (compare Exh. Book p. 34, top bar and third bar from top; R. 173-176; R. 230-231). Mr. Schneider said that "The way it is usually played" (R. 176) you couldn't tell the difference in note sizes. In this

Mr. Raksin agreed (R. 231-232). Thus, defendants' own evidence shows that an adherence to the public domain source would have induced defendants to follow this known prior art notation rather than the unique and theretofore unknown plaintiff's "absolutely infinitesimal" change in notation (R. 232). Thus, the present reliance on Mozart tends to strengthen the case as to copying rather than to weaken it. As said in *Callaghan v. Myers* (1888), 128 U.S. 617:

"* * *, there are certain unmistakable *indicia*, that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information * * *." (p. 661)

"* * * one of the most significant evidences of infringement exists frequently in the defendants' volumes, namely, the copying of errors made by Mr. Freeman." (p. 662)

It cannot be gainsaid that if defendants had followed Mozart they would have had the result of Ganne and not The Blacksmith Blues use of the Schultz figure. As Judge Learned Hand said in *Fred Fisher, Inc. v. Dillingham* (S.D. N.Y. 1924), 298 Fed. 145, at page 150:

"* * * If he claims the rights of the public, let him use them * * *. That domain is open to all who tread it; not to those who invade the closes of others, however similar."

Defendants' reliance on Gluck is no defense to plaintiff's claim.

Defendants further specifically rely upon "a theme from Gluck" (Hill Brief, p. 5, Exh. Book p. 31). In the first place, this exact notation is not shown to be in the public domain. Mr. Raksin obtained his charted version of Gluck not from a prior art publication but from a book which was copyrighted in 1950 (R. 260-261). The chart therefore is not even based upon the best evidence of that which was in the public

domain but is based upon hearsay of that which is in the public domain. Plaintiff preserved her objection to the hearsay character of these charts (R. 223-224), but was overruled (R. 223, 261).

In the second place, even if the chart be given full credence as recording that which was in fact in the public domain, it makes clear the lack of substance of any defense based upon this notation. Again, for ease of comparison, the Schultz figure, The Blacksmith Blues figure and the Gluck figure are noted in the same key in downwardly descending order in Plate V of the Appendix to this Brief.

The comparison, speaking for itself, discloses that in Gluck the triad comprises only three beats, the first beat consisting of the last beat of one bar and the second and third beats consisting of the first and second beats of another bar. On the other hand, the Schultz figure and The Blacksmith Blues encompass the entire triad in a single bar. Moreover, the sol note of the triad is but a $1/8$ note and has no identity timewise to the $1/4$ note used both in the Schultz figure and in The Blacksmith Blues. Finally the duration of the triad does not use the $3/16:1/16$ beat used in many of the bars of plaintiff's and defendants' works. It is therefore clear that defendants could not have followed Gluck in making the infringing music.

Defendants' reliance on Bach is no defense to plaintiff's claim.

Defendants further rely upon Bach (Hill Brief, p. 17) as a source of defendants' music. Plaintiff finds no mention of Bach at the record references given (R. 167, 226-232, Hill Brief, p. 17). There is a Bach Italian Concerto referred to in Exhibit E (Exh. Book, p. 33), but its exact character is made dubious not only by the hearsay nature of the chart (R. 223), but also by the question mark in the designation for the bar (Exh. Bk., p. 33). More importantly, Mr. Raksin,

“* * * It’s a series of syncopation that creates an effect. I am claiming that I originated the effect. I don’t know if I make myself clear, sir.” (R. 136)

Therefore, in this record, it is clear that plaintiff has not admitted in any way that her syncopation is old or that her Schultz figure is old. And the record discloses that both are original and that both are used in “The Blacksmith Blues.”

Second, after mentioning Charlier which has been analyzed above, this brief, pp. 2-8, defendants turn to Mr. Schneider’s public domain sources, and to his general oral testimony (Hill Brief, pp. 3-4; Hoefle Brief, p. 2). Mr. Schneider’s chart is in evidence for the purposes of illustrating his testimony rather than to prove the facts (R. 160, Exh. D, Exh. Bk. p. 30). Although it was admitted that the time values on this exhibit were somewhat in error (R. 179-180), an inspection of the exhibit discloses no identity of note quality plus time value plus note placement in the bar in common to both the Schultz figure and “The Blacksmith Blues” (Exh. D, Exh. Bk. p. 30). Defendants, in all their argument point to none. Mr. Schneider was able to point to none, even upon a searching cross examination (R. 169-188).

Third, defendants also (Hill Br., pp. 4-5) turn to Mr. David Raksin’s charts (Exh. E, Exh. Bk. 31-35). Although one of these charts is admitted hearsay, having been produced by Harold Barlow (R. 228), an inspection discloses that none of them has the unique commonness found in the Schultz figure and “The Blacksmith Blues.” Defendants recognize this defect in their proclamation that * * * “the difference in the form of notation exists on paper, but not in its performance.” (Hill Br., p. 5).

Defendants’ citation of so many prior public domain sources on what now seems to be a simple figure “in itself

is evidence of the weakness of the contention" for it suggests that "none of them is in point" (*Reynolds v. Whitin Mach. Works* (4th Cir. 1948) 167 F.2d 78, 83-84; Cf. *Vegetable Oil Products Co. v. Dorward & Sons Co.* (N.D. Cal. S.D. 1943), 53 F. Supp. 281, 285).

In summation, plaintiff submits that the record in this case, particularly in view of defendants' argument, clearly establishes that there is no prior art source which discloses all of the common factors of the Schultz figure and "The Blacksmith Blues" variation. The two figures have such a unique similarity that it cannot be explained away by a shotgun sweep of the prior public domain sources.

Defendants' reliance on the District Court's findings with respect to prior art is misplaced.

Interspersed throughout their discussion of the prior art, defendants refer to the prior art comparatively both as indicating that "The Blacksmith Blues" is virtually the same as Charlier and that the Schultz figure is practically the same not only note wise but also rhythmically to the prior art and they infer that the court's generalized findings, discussed in detail in appellant's opening brief pp. 35-47, support their present argument. Plaintiff submits on the other hand that the defendants' present argument goes beyond the findings of fact actually entered in this record and that the District Court refused to enter findings of fact which would have tended to support the defendants' present argument.

It appears from the typed transcript, page 82, that the court struck proposed finding 10 submitted by attorneys for certain of the defendants. Proposed Finding 10 recited:

"10. The musical content of the musical themes of the first two bars of plaintiff's compositions, which themes appear elsewhere in said compositions, shows substantial similarity to previously published material,

much of which dates from the 18th and early 19th Centuries, and has become a part of the public domain of music; said musical content shows no significant modification, variation or improvement by plaintiff upon said public domain and other previously published material."

At the same time, the court struck proposed conclusion of law IV appearing at page 84 of the typed transcript as follows:

"IV

The musical content of plaintiff's compositions 'Good Old Army' and 'Waitin' For My Baby,' insofar as such musical content bears any resemblance to 'Happy Pay Off Day' and 'The Blacksmith Blues,' lacks originality and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and the copyrights heretofore issued therein are to that extent void, and of no force and effect."

Thus, the District Court refused to find the absence of originality which defendants now urge. This is equivalent to a negative finding against the defendants upon this issue.

In *Miller v. Life Insurance Company* (1870), 12 Wall. (79 U.S.) 285, the court pointed out, page 300:

" * * * Rejected by the Circuit Court as the several requests under consideration were, it is too plain for argument that no one of the propositions of fact therein contained is found to be true by the Circuit Court.
* * *"

Wilhartz v. Turco Products (7th Cir. 1947), 164 F.2d 731, 733, is to the same effect.

Defendants' argument on dissimilarity evades the question.

Plaintiff in her opening argument showed substantial similarities between the Schultz figure and all of the state-

ments of "The Blacksmith Blues" in specific detail. Defendants' counter-showing does not take real issue with the representations which plaintiff made as to the similarities but seeks to avoid this showing by urging inconsequentia wholly apart from the unique commonness between the plaintiff's works and the putative infringements.

First, defendants dwell (Hill Br., p. 7) on the differences between measures 2 of the respective compositions and upon the fact that the statement bars of the two songs line up only twice in a measure by measure playing. The argument is a non sequitur. In making this argument, the defendants compare a statement form of bar used in the plaintiff's music with an answer form of bar used in defendants' music. However, plaintiff has not charged defendants with copying the entire theme of her music, but has charged defendants with copying her statements. Certainly one does not avoid infringement by changing the order in which one uses the infringing materials. For example, an alphabetical telephone directory would be infringed by a revamping of the directory in phone number arrangement (*Leon v. Pacific Telephone & Telegraph Co.* (9th Cir. 1937), 91 F.2d 484). Still one could not make a side-by-side comparison of page 2 of the alphabetical directory with page 2 of the phone number directory and find any similarity.

In attempting to shift attention from the Schultz figure, defendants urge that Charlier discloses the same melodic line precisely (Hill Br., p. 12). We have already shown that this similarity suggests only that "The Blacksmith Blues" is a combination of two sources (this brief, pp. 2-8). But this combination of the Schultz figure with the Charlier theme does not exonerate the combiner from a charge of infringement of the Schultz figure. The contrary is recognized in *Leon v. Pacific Telephone & Telegraph Co.* (9th

Cir. 1937) 91 F.2d 484. There the court characterized the facts of *Weatherby & Sons v. International Horse Agency and Exchange, Ltd.* (1910), 2 Ch. 297, 304; 79 L.J. Ch. 609, as follows, p. 487:

“* * * This case deals with the claimed infringement of the copyright of a stud book published periodically. The defendants made use of the material in this book and of another book which had originated a figure system for rating breeding race horses. The infringing work was a sort of combination of the two. * * *”

And in *Boosey v. Empire Music Co.* (S.D.N.Y. 1915), 224 Fed. 646, the court said, p. 647:

“The two compositions are considerably different, both in theme and execution, except as to this phrase, ‘I hear you calling me,’ and, as to that, there is a marked similarity.”

If defendants’ argument were sound, one who stole an engine from an automobile having the engine up front would be relieved of responsibility for theft if he used the stolen engine in an automobile having the engine in the rear.

Secondly, defendants urge that the use of the Schultz figure in modulated bars 5, 7, 13 and 15 is excused because the modulated notes do not give the same tonal impression.

Simple perception discloses that the modulated variations are substantially identical with the original variation save that the individual notes have each been collectively dropped as a unit a total of three notes. If this distinction were sound, then most of the defendants’ prior art music could not possibly be applicable in this case because in many of the cases it was essential to reduce the note structure to a common scale to demonstrate what little similarity defendants have been able to find thus far.

Thirdly, defendants urge that the passing note is different (Hill Br., p. 10). This is a factor which plaintiff conceded, but the fact remains that both tunes use a passing note of the same identical length located at the same identical place in the bar and having a tone quality intermediate the mi and the sol components of the triad. This argument is akin to the argument that a painter would avoid infringement by copying all of the colors of a painting except for the substitution of a light red in exactly the same spot where the original painter had used a medium red. As Mr. Justice Jackson pointed out in speaking for the court in *Graver Mfg. Co. v. Linde Co.* (1950), 339 U.S. 605, 607:

“* * * One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement.”

Finally, defendants urge that the intent of the music is different. Plaintiff submits that she is entitled to the exclusive use of her figure regardless of the intent of the music in which it is to be used. It is analogous to the use of a serious work for a burlesque where this court held that intent was not a factor in avoiding infringement. This ruling was made in the recent case of *Benny v. Loew's Incorporated* (9th Cir. 1956), 239 F.2d 532, affirmed (1958) 356 U.S. 43.

Earlier the defense of different intent was cast aside in *Leon v. Pacific Telephone & Telegraph Co.* (9th Cir. 1937), 91 F.2d 484, at p. 486:

“* * * The defendants' contention in this regard rests entirely on the proposition that the numerical directory serves a different purpose than plaintiff's alphabetical directory.”

Plaintiff, therefore, submits that defendants' argument on plaintiff's points of similarity is without substance and does not avoid the charge of infringement.

Defendants have not distinguished plaintiff's authorities.

Defendants (Hill Br., pp. 11-16) endeavor to distinguish plaintiff's authorities on factual bases having little to do with the legal proposition for which plaintiff cited the cases. All of these cases are cited in support of the proposition that where there is a unique similarity between two compositions which is not satisfactorily explained by the existence of common sources, the plaintiff has met her burden of proof in establishing infringement of her copyright. True, some of the authorities cited represent different types of peculiarities and a different quantum of peculiarities than those present in the case at bar. However, this is merely a matter of degree in the several factual situations involved and it is not a matter of substance in the application of the law. In the case at bar, the similarities are few but the uniqueness of these similarities is thoroughly attested by the multitude of prior art music which defendants have located, all of which fails to disclose this commonness. The very quantity of the prior art demonstrates that the Schultz figure is neither commonplace nor one readily susceptible to independent origination.

Defendants overstate admissions as to access.

Defendants' chapter heading (Hill Br., p. 17) is "Evidence of Use is Concededly Absent." Plaintiff conceded only that there was no direct evidence that defendants had ever seen or heard plaintiff's music. It is plaintiff's position that the circumstantial evidence of access is virtually conclusive on the instant record in view of the peculiar similarities

found in the two pieces of music and not found in the prior art. Mere repetition that the Schultz theme is a common device and mere repetition that the figure is found in numerous public domain sources in evidence (Hill Br., p. 17) do not alter the record in this case which proves that the Schultz figure and those portions of the Schultz figure which defendants have used in "The Blacksmith Blues" are not found in any of the prior art.

Defendants' authorities are distinguished.

Defendants set forth the law in support of their position on a page and one-half of their entire brief (Hill Br., pp. 18-19). Plaintiff submits that the authorities which defendants cite are inapposite to the facts appearing in the instant record.

Arnstein v. Edward B. Marks Music Corporation (2nd Cir. 1936), 82 F.2d 275 (cited Hill Br., page 18) is a case in which all that was common to the plaintiff's and to the defendant's music was found in the prior art, a factor which the court emphasized in its decision. The court, in an opinion by Judge Learned Hand, pointed out that the defense consisted of a "showing that the common parts of the two pieces have occurred elsewhere and by the denials of the persons charged with the piracy." (page 275). After discussing generally the similarities between the two pieces and the full history showing how the defendant's piece was actually composed, the court then noted, page 277:

"* * * The first phrase of the infringing chorus consists of the same four notes as the first phrase of the copyrighted song; that particular sequence can be found in several earlier musical pieces and its spontaneous reproduction should be no cause for suspicion.* * *"

This is a distinction of real substance over the facts at bar because here the same notes do not appear in any earlier

musical piece. Although the triad both with and without a passing note appears in a great deal of the prior art, the prior art triads are not the same notes. A note not only has tonal quality but also has time duration and relative location in a bar. The musical effect of any musical figure is an effect created by the combination of the tone quality, the time value, and the placement of the notes just as the effect of a painting is created by the choice, the shade and placement of the colors which are used.

The *Arnstein* case was distinguished in *Wilkie v. Santly Bros.* (2nd Cir. 1937), 91 F.2d 978, at page 979. The court later pointed out, page 980:

“* * * The extensive and forceful similarities between the two compositions have not been satisfactorily explained by the existence of a common source nor by the alleged stereotyped conventionalities which are said to pervade popular songs.”

Darrell v. Joe Morris Music Co. (2nd Cir. 1940), 113 F.2d 80 (cited and quoted Hill Br., pp. 18-19) is distinguished upon the same basis as *Arnstein*. In *Darrell* the court in a per curiam opinion, following *Arnstein* but not overruling *Wilkie*, pointed out, page 80:

“* * * the defendants have been able to discover substantial equivalents of that at bar in a number of pieces which appeared earlier than the plaintiff's, * * *.”

In the case at bar the record discloses that there is no substantial equivalent in any piece to the unique points of similarity between plaintiff's music and defendants' music.

Lampert v. Hollis Music (E.D. N.Y. 1956), 138 F. Supp. 505 (cited Hill Br., page 19) is similarly distinguished. In that case the court, page 509, found that “coincidence of concept could well account for this three note sequence of tones, three times rendered in ‘Annabella’ and five times

in 'Cause I Love You,' " because "such a sequence is to be found in the well-known round 'Three Blind Mice,' and also in the composition called 'Largo al Factotum' from the 'Barber of Seville.' " As to the latter, the evidence showed that the artist "uses the same exact notes as appear in 'Annabella.' " (p. 509).

Carew v. R.K.O. Pictures, Inc. (S.D. Cal. 1942), 43 F. Supp. 199 (cited Hill Br., page 19) has no similarity to the case at bar. In that case District Judge Yankwich found no infringement, page 202 "because the sequence of the notes had been changed." It appeared that "the only similarity lay in the use of two of the three notes, in reverse order." On the other hand, in the case at bar, five of the notes display an exact similarity both quality wise and time value wise, i.e., the 3/16 do, the 1/16 do, the 3/16 mi, the 1/16 mi and the 1/4 sol, and there is an exact correlation between the two passing notes as to their time value and precise location in the bar.

Newcomb v. Young (S.D. N.Y. 1942), 43 F. Supp. 744 (cited Hill Br., page 19) is distinguished upon the same grounds as those here urged for *Arnstein, Darrell* and *Lampert*. *Newcomb* turned on the fact that the only matter having any identity between the defendants' work and the plaintiff's work was also found in the prior art. The court particularly pointed out, page 746, that "several of them are more similar to plaintiff's song than defendant's is."

Plaintiff, therefore, submits that the cases cited by defendants do not support the instant decision. In relying upon such authority, defendants merely beg the question as to whether infringement is spelled out where the common peculiarities between the two pieces *are not found in the prior art*. In all of the cited authorities, the similarities between the two pieces were found in the prior art.

Defendants have not overcome plaintiff's attack upon the questioned findings.

Defendants make a two page response to plaintiff's attack upon the findings of fact entered by the District Court (Hill Br., pp. 20-21).

With respect to Finding 5, plaintiff adheres to her opening statement that Holmes "wrote" the pieces of music but submits that this is not a concession that he "composed" the music or that the compositions were "original." Plaintiff adheres to her argument (opening brief, pp. 35-36) that there is no evidence in this record that Holmes was the composer of the music or that it was original. It is now clear that the evidence to the contrary establishes that Holmes merely combined the best parts of plaintiff's music and Charlier's music in writing "The Blacksmith Blues."

Defendants seek to support the licensing part of Finding 6 on the ground that the verified answers contain allegations to that effect. It is clear that the allegations of an answer are not evidence sufficient to support a finding of fact.

Defendants have not responded specifically to the remaining contentions on the findings discussed in appellant's opening brief, pp. 37-47 other than to urge that the evidence discussed in earlier portions of defendants' argument supports these findings (Hill Br., p. 21). Plaintiff submits that such an argument is not responsive and that so far as it is responsive this reply brief shows its lack of substance.

CONCLUSION

Plaintiff submits that the defendants have not overcome the affirmative position taken by her in her opening brief in which plaintiff showed that the common peculiarities between the two sources were such as to create circumstantial evidence of access and copying. Defendants' argument to the contrary that the peculiarities are not actually peculiar but are found in the prior art is not supported by the evidence and is not supported by any findings of the District Court. On such a record, the defendants had the burden of explanation, a burden which they did not meet. Plaintiff, therefore, prays that the judgment of the District Court be reversed with instructions to enter judgment in accordance with the plaintiff's prayer for relief set forth in her amended complaint.

Respectfully submitted,

CARL HOPPE
JAMES F. MITCHELL
2610 Russ Building
San Francisco 4, California

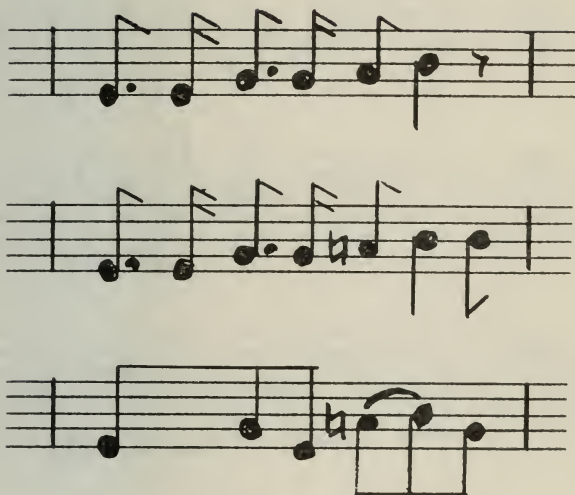
THOMAS P. MAHONEY
4055 Wilshire Boulevard
Los Angeles 5, California

Attorneys for Appellant

(Appendix follows)

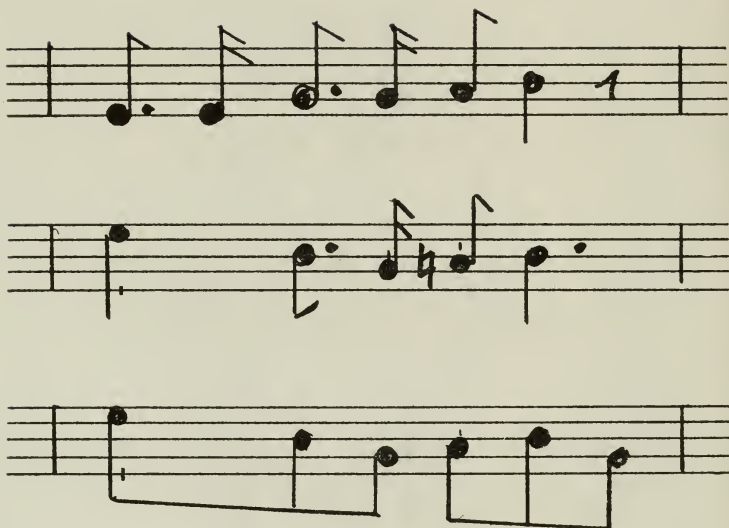
Appendix

Plate I



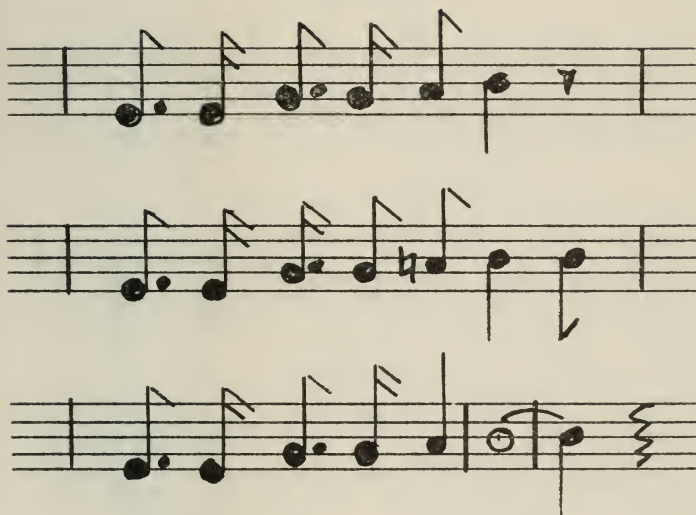
Comparison of
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The Blacksmith Blues (Exh. Bk., p. 14)
Charlier (Exh. Bk., p. 39)

Plate II



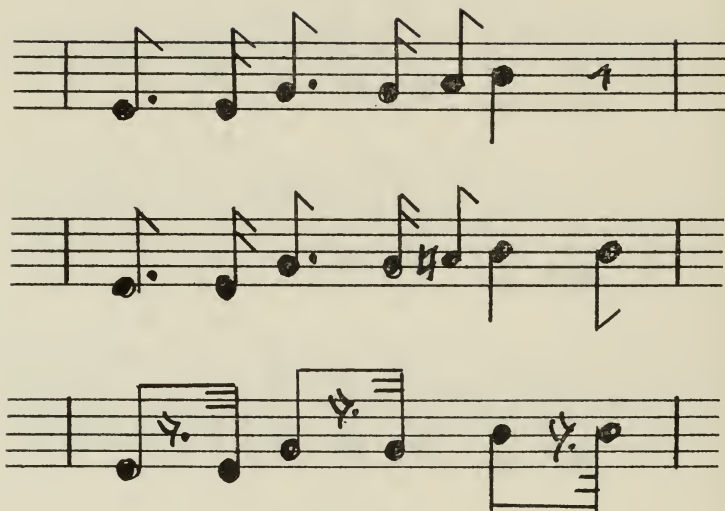
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The Blacksmith Blues (Exh. Bk., p. 14)
Charlier (Exh. Bk., p. 39)

Plate III



Comparison of
The Schultz figure (Exh. Bk., p. 7)
The Blacksmith Blues (Exh. Bk., p. 14)
The Saints Go Marching In (Exh. Bk., p. 34)

Plate IV



Comparison of

The Schultz figure (Exh. Bk., p. 7)

The Blacksmith Blues (Exh. Bk., p. 14)

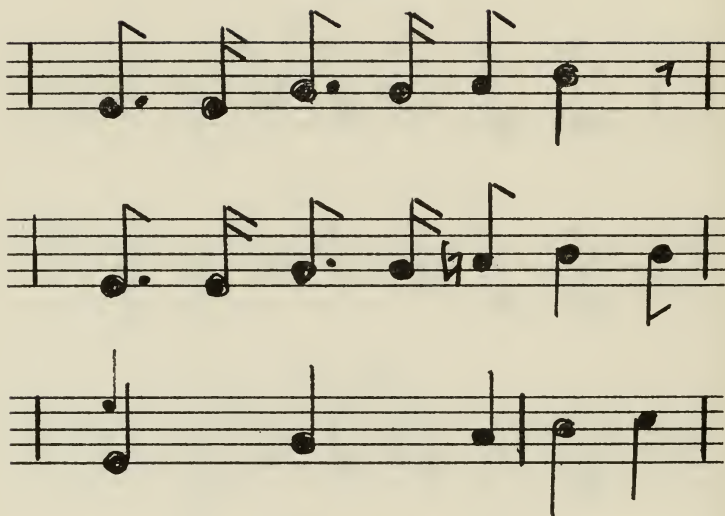
Mozart Symphony (Exh. Bk., p. 34)

Plate V



Comparison of
The Schultze figure (Exh. Bk., p. 7)
The Blacksmith Blues (Exh. Bk., p. 14)
Gluck (Exh. Bk., p. 31)

Plate VI



Comparison of
The Schultz figure (Exh. Bk., p. 7)
The Blacksmith Blues (Exh. Bk., p. 14)
Bach Concerto (Exh. Bk., p. 33)

Plate VII



Comparison of
The Schultz figure (Exh. Bk., p. 7)
The Blacksmith Blues (Exh. Bk., p. 14)
Old Black Joe (Exh. Bk., p. 30)

